

A NOTE ON JUDICIAL ACTIVISM

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In recent popular Supreme Court folk-lore the heroes have come to be identified as the "judicial passivists"; the villains as the "judicial activists." Only recently have these terms superceded the old liberal-conservative labels as the framework for debating Supreme Court decisions. The most impressive of recent attacks on the Court (I speak only of its source) cast in these terms is that of the Conference of Chief Judges. Concluding that the Court "has tended to adopt the role of policy maker without judicial restraint" the Conference proceeded to urge the Court to "exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe and permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable" Professor Kurland, in his refreshingly objective and perceptive remarks on the Supreme Court, printed in these pages, stated his reasons for concurring in the view that the Court should abandon its activist role, having made clear that what he was deploring was judicial legislation in the interests of the "liberal" political outlook, comparable to the pre-New Deal Court's judicial legislation in behalf of business interests.

My purpose in this brief note is not particularly to take issue with Professor Kurland. I suspect we should turn out to be basically in agreement after all the replies, rejoinders and rebuttals were in. Nor would I want to defend adjudication by personal taste as a principle of decision-making. That I will leave to a notable school of historians and political scientists who decline to see the legal process as anything more than a chintz cover for the thrust of sheer power and will. Moreover, I find myself fundamentally in agreement with many of the critical observations concerning the contemporary Court made by such perceptive students as Professors Freund, Hart and Wechsler, as well as Professor Kurland. In all fairness I should make clear that I do not intend here a rounded evaluation of the Court. I intend rather to argue a point, to make a case, if you will, which I think needs to be made if the widely distributed partisan cases made against the Court are not to deny casual viewers of the Court's work a chance to render a fair verdict. I shall argue two points: (1) that the popular dichotomy between activism and passivism in constitutional adjudication is a vast and terribly distorting oversimplification; that it distracts attention from the fundamental problems of the painful task of adjudication and converts subtle and difficult problems into melodrama; and (2) that it is something of a straw man, since the present Supreme Court cannot fairly be charged, on the whole, with having been guided by this philosophy, whatever doubts one may have about individual Justices on certain occasions.

Judicial passivism as a guide to adjudication has an obvious appeal. In a democratic community where the people are supposed to make the basic determinations of policy, at least indirectly, the spectacle of life-tenured appointed judges usurping that function seems quite indefensible. It is more

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comforting to think of our judges as passive, or better still, mechanical instruments faithfully echoing the voice of the people as cases and controversies are brought before them. The trouble is that the judicial process does not work this way. We have long since, at least in this country, given up the notion that it does, or that it should. It is no longer the extreme realist school which holds this view. Every practicing lawyer knows that in the serious and difficult cases presented to state Supreme Courts either the legislative command speaks in inaudible whispers, or about something else, or the case law can fairly be made to support either position or neither, depending upon how you read it. In such impasses, how are courts to remain passive and still do their job? I am not suggesting that courts in these situations are left wholly at large to translate their purely personal preferences into law. I am suggesting the obvious point that the task calls for the sophisticated arts of statutory interpretation and common law adjudication entailing in the former an *active* role in (to borrow Learned Hand's phrase) "proliferating the purpose of a statute," and in the latter, an *active* imagination in projecting alternatives and making choices in the light of what the law was, is, and should become, guided by sensitivity to the more insistent of the moral and social values competing for recognition. When courts are called upon to exercise these arts they are making law. We have long since ceased to object because we have come to realize that in such impasses there is no alternative; law will be made whichever way the decision goes and it is better that it be developed in the light than in the dark.

What is true for the adjudication of day to day issues of property, tort and contract by state appellate courts is of course doubly true of the process of giving contemporary meaning to a document shorter than many chapters of the Internal Revenue Code and hammered out by compromise 170 years ago. Congress shall have power to regulate commerce among the several states. But what is commerce? Shall it be confined to transportation between states? Shall it extend to some or all phases of commercial intercourse? What of transactions or occurrences technically complete within a state which have ramifications upon the national economy? Considering the broad grant of power to Congress to regulate commerce, how much is left of the states' power to tax and regulate when interstate commerce is affected? Congress shall make no law abridging freedom of the speech or of the press. But where are the lines of force of freedom and authority to be vectored out? Neither Congress nor the states may deprive any person of life, liberty or property without due process of law. But what is the process that is due and when must it be accorded? Does it have meaning to posit the ideal of a Supreme Court passively resolving such issues by straightforward interpretation of the constitutional text? Justice Roberts once observed that all the court need do is match the text of the constitution against the claim of power asserted. But no one has taken this remark literally, not even Justice Roberts. Is it not the case that the task of probing for answers to the kinds of questions just raised in the context of case by case adjudication calls for the highest qualities of judicial statesmanship, of a sensitive awareness to the contemporary situation in its major dimensions — economic, technological, social, cultural, moral, and even political — assessed in the light of the ethos of the constitutional document?

Consider, for example, the Segregation Cases which posed for decision the compatibility of enforced public school segregation with a regime of equality under the law. On the one hand stood a deeply ingrained tradition of enforced separateness, approved by a divided court a half century earlier under the rationale that separation is not inequality where separate facilities are equivalent. And behind this rationale stood the formidable principle of freedom of association. On the other hand, a war had been fought for emancipation and equality. Were the ideals of that struggle forever to be denied because their realization was not originally complete? Should *stare decisis* stand as an impregnable barrier to improved and refined insights into the nature of the ideal of social justice? Assuming that equality was compatible with compulsory segregation at the turn of the century, does it follow that it is compatible today? The democratic principle of freedom of association, formidable though it is, is countered by an equally commanding principle of equality, subtly undermined by consigning a minority group of citizens, identifiable only by the pigment of their skin, to a separate school and playground, fenced off from the majority by operation of law. Where does the balance lie between these principles? The institution of judicial review of a written constitution by a national Supreme Court demands a judicial determination. Yet, what "passive" rules of law will resolve these searching problems by their simple application to the facts of segregation?

What is true of the impasse created by the collision of the principles of freedom of association and equality under law is true of a significant portion of constitutional adjudication: the collision of freedom of speech with the preservation of the integrity of the system of democratic government when speech threatens that system; the collision of basic deficiencies in the administration of criminal justice with the need for an effective system for the detection, apprehension and conviction of criminals. Further examples abound in the pages of the United States Reports. The point is that in thrusting such decisions upon the Court we demand that our Justices be philosophers, sociologists, historians, even social engineers. To condemn them for their "activism" when they assume these roles is to condemn the use of reason in the resolution of such controversies. The line between a willful subjectivism and a large and encompassing liberalism in constitutional interpretation is concededly fine. Certainly the greatest intellectual honesty and self-discipline is imperative to keep the latter from degenerating into the former. But I think that only disservice to the functioning of the institution of judicial review can result from failure to recognize the existence of that line; and that disservice is done as fully by those who insist on a naive "passivism" as by those who insist on an undisciplined "activism."

My second and final point is that the record of the work of the contemporary Supreme Court lends no substantial support to the charge that the Court has systematically overstepped that line. A proper demonstration of this proposition would require an analysis of Supreme Court decisions in a detail beyond the scope of a short note. But if it can be shown that the course of decisions has been in the direction of widening the range of legislative choice by narrowing the scope of the judicial veto power considerable doubt is cast

upon the charge that the Court has attempted to convert the power of judicial review into an excuse for legislating its preferences into law. That such has been the course of the Court's decisions is familiar enough to the student of the Court's work to require no elaborate demonstration. So far as congressional power is concerned, what once was a conspicuous restraint upon the power of Congress to govern, the due process clause, is a threat no longer. Where once any legislative innovation designed to deal with national social and economic problems was threatened with invalidation on grounds of invading property rights without due process of law, it now suffices that the regulation is not utterly arbitrary. The Court has over the years in its effort to avoid invalidating congressional acts gradually enlarged the conception of the commerce power. The occasion for the enlargement, it should be remembered, was the assertion of power by Congress through regulatory enactments; the Court's participation was confined to declining to invalidate them. So far as concerns the scope of state power to govern, the movement has been in the same direction. Economic due process attacks on state legislative decisions are now a source of concern in state courts far more than in Supreme Courts.¹ And the Supreme Court's permissiveness has extended quite as fully to "il-liberal" acts as to "liberal" ones.² While enlarging the commerce power to sustain congressional legislation the Court has at the same time sustained the power of the states to tax and to regulate to achieve local purposes in situations where earlier courts might easily have found an interference with interstate commerce. Considerable criticism has been levelled against recent decisions invalidating state criminal prosecutions on procedural due process grounds. Yet, looked at in the large the Court has, if anything, been tolerant to a fault rather than willful in enforcing procedural commitments upon the states — declining to enforce the McNabb exclusionary rule upon the states, refusing to invalidate convictions founded on evidence procured through unconstitutional search and seizure, imposing less severe standards on the states in the obligation to provide counsel than in federal proceedings. The recent decisions on legislative investigations and preemption have also drawn heavy fire as instances of judicial activism. Yet in none of these cases did the decision of the Court paralyze legislative power. The Watkins decision did not call a halt to congressional investigation into subversion. It rather required that Congress or the investigators more explicitly define the scope of the inquiry undertaken so that witnesses might more fairly judge their duty to respond under a congressional act which imposes that duty only when the question is pertinent to the investigation. The much criticized Nelson and Guss cases, invalidating the application of state sedition and labor legislation, constituted a reading of Congress' will which Congress itself left shrouded in unnecessary mystery in the first place and which, in any event, Congress could at any time set right. (Indeed, it has already done so with respect to the Guss decision.) Of course, much more would have to be said genuinely to prove my proposition. But in the light even of such a sketchily presented record of judicial deference to legislative

¹ For an example close to home compare *Ritholz v. Salt Lake City*, 3 Utah 2d 385, 284 P.2d 702 (1955), with *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

² See *Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949) sustaining state "right-to-work" law against due process challenge.

power, state and federal, it becomes difficult in the extreme to maintain the view that the Court has attempted to take over the legislative role under cover of adjudicating disputes.

Why, then, all the shouting? Perhaps one reason inheres in the subtlety of the line separating willful subjectivism from rational adjudication. If there is merit to the point that the task of constitutional adjudication requires the exercise of a widely informed judgment on prevailing contemporary impasses necessitating a subtle appraisal of the possible and likely points of balance of mutually contending policies and values, then it would seem quite expectable for the casual observer to find in some decisions of the Court what appear to be matters in the domain of politics and philosophy with which it seems the Court has no business to be dealing. This being true of the uninformed it may be expected to be doubly true of the involved. If the Southern segregationists see the Segregation Cases as motivated by a personal, misguided and uninformed set of values of the Justices; if the police, set back by a reversal of a conviction because the Court deemed prolonged secret detention intolerable, view the decision as guided by an unsupportable softness for the criminal class; if the security conscious see a decision reversing a conviction of an alleged Communist as evidence of a judicial predilection for left-wing causes — it should not be surprising. But it gives point to the query whether much of this kind of criticism may fairly be put down not so much to the fact that the Supreme Court is grinding axes as to a resentment that the Court is not grinding the right ones.